

IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

MSC No: 157646
COA No: 333720
Trial Ct No. 15-002788-FC
Jackson County Circuit Court

RODNEY MCKEE,

Defendant-Appellant.

JACKSON PROSECUTING ATTORNEY
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DEFENDANT-APPELLANT'S REPLY BRIEF

*****ORAL ARGUMENT REQUESTED*****

Respectfully submitted,
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TABLE OF CONTENTS

TABLE OF CONTENTS	i
INDEX OF AUTHORITIES	ii
STATEMENT OF QUESTIONS PRESENTED	iii
STATEMENT OF JURISDICTION	iv
ARGUMENT	1
I. IT WAS AN ABUSE OF DISCRETION AND CLEAR ERROR TO DENY DEFENDANT- APPELLANT’S MOTION FOR A MISTRIAL WHERE SUBSTANTIAL RIGHTS WERE IMPAIRED BY ADMISSION OF AN IMPROPERLY REDACTED CODEFENDANT’S STATEMENT THAT WAS ALSO PREJUDICIAL, NON-AUTHENTICATED INADMISSIBLE HEARSAY USED AS SUBSTANTIVE EVIDENCE.	1
RELIEF REQUESTED.....	6

INDEX OF AUTHORITIES

Cases

<i>Brown, III v. O'Dea</i> , 187 F.3d 572, 578 (6th Cir. 1999)	3
<i>Cooper v. Sowders</i> , 837 F.2d 284, 287 (6th Cir. 1988)).....	3
<i>Estelle v. McGuire</i> , 502 U.S.62, 68 (1991).....	3
<i>Leverett v. Spears</i> , 877 F.2d 921, 925 (11th Cir.1989)	3
<i>People v Furline</i> , 505 Mich 16, 21; 939 NW2d 447 (2020),	4
<i>People v Hana</i> , 447 Mich 325 (1994).....	4
<i>People v Jenkins</i> , 450 Mich. 249, 273; 537 N.W.2d 828 (1995).....	2
<i>People v Lundy</i> , 467 Mich. 254, 257; 650 N.W.2d 332 (2002).....	2
<i>Redman v. Dugger</i> , 866 F.2d 387, 390 (11th Cir.1989)).	3

Rules

MCR 7.312(E)(3).....	iv
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STATEMENT OF QUESTIONS PRESENTED

- I. WHETHER IT WAS AN ABUSE OF DISCRETION AND CLEAR ERROR TO DENY DEFENDANT-APPELLANT'S MOTION FOR A MISTRIAL WHERE SUBSTANTIAL RIGHTS WERE IMPAIRED BY ADMISSION OF AN IMPROPERLY REDACTED CODEFENDANT'S STATEMENT THAT WAS ALSO PREJUDICIAL, NON-AUTHENTICATED INADMISSIBLE HEARSAY USED AS SUBSTANTIVE EVIDENCE?

Defendant-Appellant answers "Yes".

STATEMENT OF JURISDICTION

This Reply is provided pursuant to MCR 7.312(E)(3).

ARGUMENT

- I. **IT WAS AN ABUSE OF DISCRETION AND CLEAR ERROR TO DENY DEFENDANT-APPELLANT'S MOTION FOR A MISTRIAL WHERE SUBSTANTIAL RIGHTS WERE IMPAIRED BY ADMISSION OF AN IMPROPERLY REDACTED CODEFENDANT'S STATEMENT THAT WAS ALSO PREJUDICIAL, NON-AUTHENTICATED INADMISSIBLE HEARSAY USED AS SUBSTANTIVE EVIDENCE.**

Statements Offered in the Prosecution's Case:

It is important to note that the statements attributed to Co-defendant Butler, introduced in the case in chief through police officers, were offered as substantive evidence that the prosecutor argued in closing should itself be relied upon to convict Defendant-Appellant Rodney McKee. The prosecutor confirmed these out of court statements provided the primary evidence of guilt, showing why, when, where, what and whom, referring to them as the nail in the coffin, without reference to any other nails.

The prosecutor then vouched for the credibility of those police officers, Sullivan and Merritt, while letting the jury know that there are matters not known to the jury, but known to the prosecutor and judge that permits telling the jury that Butler's statements must be true because otherwise the trial judge would not have allowed the jury to hear the statements. The jury was given the prosecutor's office and the trial judge's approval that Butler's statements were lawfully obtained. (T VIII, 66). Thus, there is no basis to apply the "spillover theory" advanced herein by the prosecution, as the jury was instructed and at trial the prosecution presented those statements as substantive evidence against Rodney McKee.

The "spillover theory" is applicable only when evidence against one defendant is not admissible against another defendant. Therefore, Plaintiff-Appellee's claim that this case only involves "spillover" effect evidence, borders on the disingenuous as the jury was instructed to consider Butler's statements as substantive evidence upon which to convict.

Plaintiff-Appellee's argument that the statements introduced by Sullivan and Merritt is erroneously premised upon the statements being both admissible, and limited to Butler, providing only an acceptable spillover effect on the codefendants, much as would occur if the statements were offered to impeach Butler. The premise is false on both counts. The prosecutor sought permission from the trial court and was approved to offer the evidence as substantive evidence against Defendant-Appellant Rodney McKee. The jury was not instructed to compartmentalize the evidence, and instead was told the statement could be received as substantive evidence.

Butler's statements were inadmissible as lacking reliability and the jury was instructed to treat the statements as substantive evidence against Defendant-Appellant Rodney McKee. The general rule is that "prior unsworn statements of a witness are mere hearsay and are generally inadmissible as substantive evidence." *People v Lundy*, 467 Mich. 254, 257; 650 N.W.2d 332 (2002). "Extrinsic evidence of a prior inconsistent statement can be used to impeach but it cannot be used to prove the truth of the matter asserted, unless, of course, it falls within a hearsay exception." *People v Jenkins*, 450 Mich. 249, 273; 537 N.W.2d 828 (1995).

The Michigan Court of Appeals ruled the statements did not fall within any hearsay exception and were inadmissible. That court's analysis determined that Butler

was not prejudiced by the evidence, that court also operated under a misconception that the jury was properly instructed on how to receive this evidence, whereas the jury was instructed to use the Butler's statements as proof of Defendant-Appellant Rodney McKee's guilt and thereby denied a fair trial.

Conviction upon inadmissible evidence denies due process and a fair trial. Here, the improper admission of evidence violated the Defendant-Appellant's constitutional rights. *Estelle v. McGuire*, 502 U.S.62, 68 (1991). A federal court will grant habeas corpus relief where a violation of the state's evidentiary rule results in the denial of fundamental fairness, and therefore, a violation of due process. *Brown, III v. O'Dea*, 187 F.3d 572, 578 (6th Cir. 1999) (citing *Cooper v. Sowders*, 837 F.2d 284, 287 (6th Cir. 1988)). "The standard in determining whether the admission of prejudicial evidence constitutes a denial of fundamental fairness is whether the evidence is 'material in the sense of a crucial, critical highly significant factor.'" *Leverett v. Spears*, 877 F.2d 921, 925 (11th Cir.1989) (quoting *Redman v. Dugger*, 866 F.2d 387, 390 (11th Cir.1989)). *Brown, III v. O'Dea*, 187 F.3d at 578.

As acknowledged and argued by the prosecutor, Butler's statements were the centerpiece of the prosecution's case and material in the sense of a crucial, critical highly significant factor and relief therefore is merited.

There was no basis for admitting Butler's statements at this trial in the case in chief and the Michigan Court of Appeals agreed. The statements that were admitted were also not properly redacted as identified in the Brief on Appeal. The prohibited statements were so prejudicial it deprived Defendant-Appellant of due process and a fair trial.

Butler's Trial Testimony:

Butler's trial testimony exonerated himself while directly implicating Defendant-Appellant. Mistrial should have been declared at this point as the prejudice feared to occur through a joint trial, manifested itself. Butler's testimony provided the necessary record of the need for separate juries at this point. This is the opposite of what occurred in *People v Furline*, 505 Mich 16, 21; 939 NW2d 447 (2020), which affirmed and clarified *People v Hana*, 447 Mich 325 (1994). "A defendant's claim of prejudice must be 'substantiated' through 'concrete facts.' [*Hana*, supra]. We stressed in *Hana* that the failure to show prejudice to substantial rights, 'absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision.' [*Hana*] at 347." *Furline*, supra.

Here, Butler "sought to convict the other" claiming it was Morgan and the McKees that were responsible for the murder and Defendant-Appellant Rodney McKee was forced to "defend in turn against the other's antagonistic defense."

Prior Bad Acts:

When prosecutor intentionally introduced prohibited prior bad acts evidence of Butler, a mistrial should have been declared. The prejudice from specific prior acts concerning a prior homicide had already been judicially determined, and exclusion was the trial court's attempt at a fair trial.

As pointed out in the Brief on Appeal, the prosecutor deliberately inquired into the prohibited prior bad act contaminating the jury with inadmissible prejudicial evidence.

Rodney McKee was denied his rights to fair trial, presumption of innocence, confrontation of witnesses, and due process. As a result of this being a joint trial, the jury was exposed to manifestly prejudicial yet non-probative information of a prior murder committed by codefendant Clifford McKee and of 7 other murders committed or involving codefendant Cortez Butler. Also involved was Dale Morgan, who provided statements made by Cortez Butler. The evidence was offered in the form of alleged confessions by Butler made to Morgan and police officers, offered during the presentation of the case of a murder in 1992, 2014, a triple homicide, and during rebuttal, a police officer testified to another confessed murder in Flint, and another in Ohio. None of these murders had anything to do with the case against Rodney McKee, but the prosecutor argued the other murders established Butler as a "hit-man".

The requisite prejudice identified in *Hana* and clarified in *Furline*, occurred in this case denying a fair trial requiring reversal and a new trial.

Plaintiff-Appellee has glossed over the inadmissible prejudicial statements of Butler that denied a fair trial and instead claims the prior bad acts of Butler were properly introduced against Butler during cross-examination and any prejudice to codefendants was acceptable spillover citing *United States v Cordero*, 973 F3d 603 (6th Cir, 2020). To be clear, the prior act of a murder for which Butler was convicted is not in dispute. Rather, it is the murders associated with Butler, improperly introduced by the prosecutor during cross-examination that is being contested. The prior act at issue was the subject of an evidentiary ruling by the trial court.

Plaintiff-Appellee misses the mark where the prior bad act of other murders had already been ruled inadmissible because too prejudicial and the prosecutor never

appealed that trial court ruling. *Cordero*, as cited by Plaintiff-Appellee, is applicable to evidence that was ruled admissible, and does not apply to this case.

Further, unlike in *Cordero*, where the jury was properly instructed on how to receive the evidence at the time it was given, Defendant-Appellant's jury was instructed to consider Butler's statements as substantive evidence, yet the jury did not receive any limiting instruction at the time the prior act evidence was introduced and thus, unable to prevent confusion as to how the jury should to receive that evidence. Any presumption the jury would or could compartmentalize and sort out the evidence to consider each codefendant separately is objectively unreasonable under these circumstances and Defendant-Appellant Rodney McKee was denied a fair trial.

RELIEF REQUESTED

WHEREFORE, Defendant-Appellant moves this Court to set aside leave to appeal and rule Defendant-Appellant was denied a fair trial and order a new trial.

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